Supreme Court of the United States

No. 73-328 ~~----, October Term, 19-~~

Harry J. Lehman,

Petitioner,

v.

City of Shaker Heights, et al.

Order allowing certiorari. *Filed* November 12, *19* 73

The petition herein for a writ of certiorari to the Supreme Court of the State of Ohio *is granted.*

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-328

HARRY J. LEHMAN,

Petitioner,

—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

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IN THE

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HARRY J. LEHMAN,

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—v.—

CITY OF SHAKER HEIGHTS and METROMEDIA, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

The petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in the proceeding on May 23, 1973.

Opinions Below

The opinion of the Supreme Court of Ohio affirming the Court of Appeals is reported at 34 Ohio St.2d 143 and at 296 N.E.2d 683. It is set forth in the Appendix, *infra,* at pp. 1a-16a. The Journal Entry of the Court of Appeals for Cuyahoga County, Ohio is set forth in the Appendix at pp. 19a-21a. The Journal Entry of the trial court is set forth in the Appendix at pp. 22a-23a.

Jurisdiction

The judgment of the Supreme Court of Ohio was entered on May 23, 1973. This Court has jurisdiction to review the judgment of the Supreme Court of Ohio by writ of certiorari pursuant to Title 28, United States Code Section 1257(3).

Questions Presented

1. Whether the First Amendment precludes a municipality from refusing to sell political advertising when it sells all other forms of paid commercial and non-commercial advertising for display upon a transit system it owns and operates.

2. Whether a municipality, having opened a forum to some type of expression can discriminate against paid political advertisements in favor of paid commercial advertisements.

Constitutional Provisions Involved

1. United States Constitution, Amendment I:

   Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

2. United States Constitution, Amendment XIV, Section 1:

   All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens

of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner, plaintiff below,[1] a resident of Shaker Heights, Ohio, and at the time of the events which gave rise to this law suit, a candidate for the office of State Representative to the Ohio General Assembly, sought to purchase advertising space on the Shaker Heights Rapid Transit for his political campaign.[2] Defendant Metromedia, the executive advertising agent for Shaker Heights Rapid Transit System, admitted the availability of advertising space for

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[1] Hereinafter the parties will be referred to according to their designation in the trial court.

[2] Petitioner was elected to the Ohio House of Representatives and faces reelection every two (2) years. He therefore still has a valid interest in seeking the right to purchase political advertising on the Shaker Heights Transit System. *See, e.g., Jeanette Rankin Brigade* v. *Chief of the Capitol Police,* 421 F.2d 1090, 1092-1093 (C.A.D.C. 1969); *remanded* 342 F. Supp. 575, 579-581 (D.D.C. 1972); *aff'd* 409 U.S. 972 (1972). As a result, this controversy is not moot in any legal sense. On the contrary, petitioner has a live continuing interest in its resolution despite the passage of the particular election, since it is necessary to settle a practice which is still in force. *Compare Dunn* v. *Blumstein,* 405 U.S. 330, and esp. 333 n. 2 (1972) *with Hall* v. *Beals,* 396 U.S. 45 (1969). Indeed, even voluntary termination of the policy would not create a moot controversy here. *See, e.g., Carroll* v. *Princess Anne,* 393 U.S. 175 (1968); *Lamant* v. *Postmaster General,* 381 U.S. 301 (1965); *United States* v. *W. T. Grant Co.,* 345 U.S. 629, 632 (1953); *Lankford* v. *Gelston,* 364 F.2d 197, 203 (4th Cir. 1966).

August, September and October of 1970, when it would be needed by plaintiff, but, pursuant to its written contract with the City of Shaker Heights,[3] refused to accept the plaintiff's political advertising.

According to the written contract, Metromedia accepts advertising for display on the twenty (20) spaces available within each of the transit system's cars. Metromedia has accepted advertisements for cigarettes, liquor, banks, savings and loans, retail goods and services, as well as churches and certain civil and public service advertisements such as the Girl Scouts, Boy Scouts, Peace Corps and the Police Athletic League. However, Metromedia has, consistent with its written agreement, refused to accept advertisements of a political nature.

The City has stated that the reasons for its policy of not accepting paid political advertisements are: the chance that some might interpret the advertisement as an endorsement of a particular person or idea; the chance for abuse; possibility of discrimination or favoritism; and the risk of violating passengers' rights.

The plaintiff filed a complaint with the Court of Common Pleas for Cuyahoga County, Ohio seeking an injunction and a declaratory judgment declaring defendants' policy to be a violation of his constitutional rights under the First and Fourteenth Amendments to the United States Constitution and under the Ohio Constitution. The trial court denied the request for the declaratory judgment and for a permanent injunction. The Cuyahoga County Court of

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[3] The applicable part of the contract appears in the Appendix at pp. 24a-25a. It was introduced and admitted into evidence as a joint exhibit at page 15 of the record.

Appeals and thereafter the Supreme Court of Ohio, in a four to three decision, affirmed the trial court.

The federal questions tendered herein were presented to the trial court by the complaint and a memorandum of law. The trial court passed on the questions in its journal entry. See Appendix at pp. 22a-23a. Thereafter, the issues were raised in the Court of Appeals for Cuyahoga County, Ohio, and the Supreme Court of Ohio by plaintiff's statements, briefs and arguments.

The Supreme Court of Ohio passed on the federal questions in its opinion, holding:

> Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution.

Appendix at p. 1a.

Justice Stern, joined by Chief Justice O'Neill and Justice W. Brown, dissented from the majority opinion in all respects. Appendix at pp. 7a-16a.

REASONS FOR GRANTING A WRIT

1. This Court has never directly ruled upon an important question involved here.

One of the questions presented here focuses on a recurring problem of national significance—the right of an agency of the state to limit a publicly owned, commercial advertising forum to only advertising it deems appropriate. While the Court had the opportunity to discuss whether the acceptance of commercial and public service advertising opened a "public forum"[4] in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 93 S. Ct. 2080 (1973), it declined the opportunity and held that the doctrine was not applicable in the limited circumstances presented by that case.[5] This case, then, can be the opportunity for this Court to announce, on the one hand, the extent to which *Columbia Broadcasting* affected previous doctrines concerning publicly-owned forums, or, on the other hand, the extent to which its application is limited to the peculiar circumstances of the broadcast media.

In this case, the Supreme Court of Ohio reasoned that because this Court had previously ruled in *Valentine* v.

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[4] The open forum doctrine was recently articulated by the Court in *Police Department of the City of Chicago* v. *Mosley,* 408 U.S. 92, 96 (1972), as follows:

> Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to context alone.

[5] The nature of the public forum doctrine was recognized in dicta by Mr. Chief Justice Burger, writing for the majority of the court in *Columbia Broadcasting Systems, Inc.* v. *Democratic National Committee,* 93 S. Ct. at 2099.

Chrestensen, 316 U.S. 52 (1942), that purely commercial advertising is not protected by the First Amendment, the state could not be considered to have opened a forum for free speech when they have limited the forum to commercial, non-protected, advertising.[6] Of course, such a ruling reverses the traditional view that freedom of speech has a "preferred position" in our system and gives preference to commercial advertising over noncommercial messages. *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982, 986 (1968). Under the decision below, commercial speech is protected while free speech is left to die in the cold.[7]

2. The decision below is in direct conflict with a score of recent decisions from this Court and other courts setting forth the doctrine that once a state opens a forum for speech, the forum must be held open to all speakers even though the state dislikes the content of some of the speech.

The constitutional doctrine that once a state opens a forum for speech, the forum must be held open to all who

[6] This is the precise argument presented by Justice Burke in his dissenting opinions in *In re Hoffman*, 64 Cal. Rptr. 97, 434 P.2d 353, 358-360 (1967), and *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982, 990-992 (1968). It is noteworthy that *Wirta* was cited with approval by this Court in *Columbia Broadcasting Systems, Inc.*, 93 S.Ct. 2099 n. 23. *See also Lee* v. *Board of Regents of State College*, 306 F. Supp. 1097 (W.D. Wisc. 1969), *aff'd* 441 F.2d 1257 (C.A. 7th, 1971); *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969).

[7] Additionally, the decision below led to the absurd result that a state agency may *not* prevent private companies from selling political campaign advertising, *Ross* v. *Goshi*, No. 72-3610 (D.C. Hawaii, Dec. 8, 1972), but may itself refuse to do so. *See Martin* v. *City of Struthers*, 319 U.S. 141 (1943); cf. *Saia* v. *New York*, 334 U.S. 558, 561 (1948).

wish to use it, is well established. The state is prevented by the First Amendment from banning the use of the forum simply because it finds the views expressed to be abhorrent. "[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter or its content." *Police Department of City of Chicago* v. *Mosley*, 408 U.S. 92, 95 (1972). *See also, Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946). Suppression of particular speech because of its content is emphatically not a legitimate governmental interest.

Secondly, where the content of expression is legal, the state's only legitimate interest is in regulation of the time, place and manner under ordinances designed to protect public safety and welfare and narrowly-drawn to insure no discrimination against speech on the basis of subject matter. *Shuttlesworth* v. *Birmingham*, 394 U.S. 147 (1969); *Cox* v. *Louisiana*, 379 U.S. 536 (1965); *Kunz* v. *New York*, 340 U.S. 290 (1951); *Niemotko* v. *Maryland*, 340 U.S. 268 (1951); *Saia* v. *New York*, 334 U.S. 558 (1948); *Hague* v. *C.I.O.*, 307 U.S. 496 (1939).

Obviously, the subject matter of the speech here, in an advertisement for a candidate for state legislature, is legally protected. The time, place and manner of its presentation would be no different than that which respondents already made available to cigarette and soap companies, and presented no threat to the public safety or welfare.

Certainly it could not be banned for the defendants' stated reasons, that it might invite dispute, *Terminiello* v. *Chicago*, 337 U.S. 1 (1949), especially where the anticipated

debate would be over such an entirely appropriate subject as the relative merits of candidates for public office.[8]

Despite the fact that this Court has repeatedly recognized the open-forum doctrine[9] and other courts have applied the doctrine in several cases directly in point,[10]

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[8] The regulation here cannot even be rationally supported much less meet the requirements of the more exacting compelling state interest test. The defendants have attempted to rationalize their policy on three grounds: (1) The advertisement might be interpreted as an endorsement by the city of the particular person; (2) there exists a reasonable chance for discrimination; and (3) the possible controversial nature of the advertisements might offend their passengers.

As Justice Stern recognized in his excellent dissent, the first of these so-called evils can be negated by requiring a disclaimer on the face of the advertisement. Secondly, the city may not bootstrap itself on the contention that it wishes to avoid favoritism. If it wishes to avoid favoritism, it need only accept political advertisements from all who are willing to pay the applicable rates. Finally, the cities' last contention is adequately answered by this Court's decisions in *Cohen* v. *California*, 403 U.S. 15 (1971) and *Public Utilities Commission* v. *Pollack*, 343 U.S. 451 (1952). See Appendix at pp. 14a-16a.

[9] *See, e.g., Columbia Broadcasting System, Inc.* v. *Democratic National Committee*, 93 S. Ct. 2080, 2099 (1973); *Police Department of the City of Chicago* v. *Mosley*, 408 U.S. 92, 96-97 (1972).

[10] The cases that should have been dispositive of this case are: *Danskin* v. *San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946), requiring, in an opinion by Justice Traynor, that the school district make available its building for a public meeting since the district could not arbitrarily deny the right of assembly to those whose political creeds it disapproves; *Hillside Community Church, Inc.* v. *City of Tacoma*, 455 P.2d 350 (Wash. 1969), affirming the lower court's determination that the City of Tacoma could not limit advertising for its transit system in the absence of any substantial showing that the advertisement would be a "clear and present danger"; *Kissinger* v. *New York City Transit Authority*, 274 F. Supp. 438 (S.D.N.Y. 1967), holding that city transit authority and private advertising company could not refuse to accept for display in subway stations posters opposing United States participation in the war in Vietnam, also holds that the refusal

the Supreme Court of Ohio turned a deaf ear to plaintiff's request for injunctive and declaratory relief. In short, the decision below can only be characterized as a flagrant rejection of a consistent line of authority and demands review by this Court.

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by the private company was "state action" for purposes of the Fourteenth Amendment. 274 F. Supp. at 441; *Lee* v. *Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wisc. 1969), declaring that a campus newspaper could not refuse to accept editorial advertisements; *Wirta* v. *Alameda-Contra Costa Transit District*, 64 Cal. Rptr. 430, 434 P.2d 982 (1968), holding that public transit district and private corporation which sold advertising on motor coaches could not refuse to accept peace message; *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969), holding that high school students were entitled to place a paid advertisement opposing the Vietnam War in a high school newspaper since the paper was an open forum for dissemination of opinion; *Radical Lawyers Caucus* v. *Pool*, 324 F. Supp. 268 (W.D. Tex. 1970), holding that where the official journal of the State Bar Association of Texas, an agency of the state, accepted commercial advertising and printed editorials and resolutions from its committees, refusal of bar association to accept advertisement of group of radical lawyers constituted denial of free speech and equal protection.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the Supreme Court of Ohio. In addition, it is respectfully suggested that a summary reversal on the papers is appropriate because the decision by the court below so clearly fails to take into consideration established principles of constitutional law.

Respectfully submitted,

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August 1973

Opinion of the Supreme Court of Ohio

LEHMAN,

Appellant,

—v.—

CITY OF SHAKER HEIGHTS *et al.*,

Appellees.

[Cite as Lehman v. Shaker Heights (1973), 34 Ohio St. 2d 143.]

Constitutional law—Transit advertising—Municipally-owned transit system—Refusal to accept paid political advertising—Paid commercial advertising accepted—Not constitutionally discriminatory—Not violation of free speech—Not violation of equal protection—Article XIV, Amendments, U. S. Constitution—Section 11, Article I, Constitution—Declaratory judgments.

Where a municipality has approved the acceptance of commercial advertisements for display in its owned and operated rapid transit vehicles and refuses to accept any political advertisements urging the candidacy of an aspirant to political office, such refusal is not a violation of the candidate's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

(No. 72-389—Decided May 23, 1973.)

APPEAL from the Court of Appeals for Cuyahoga County.

This action for declaratory judgment (R. C. 2721.03) was brought in the Court of Common Pleas of Cuyahoga County. Harry J. Lehman, plaintiff-appellant, sought a determination of whether his constitutional rights, under Section 11 of Article I of the Ohio Constitution, and the First and Fourteenth Amendments to the United States Constitution, were violated by the terms of a written agreement between defendant-appellees, city of Shaker Heights and Metromedia, Inc. (the exclusive advertising agent for the Shaker Heights Rapid Transit System). The agreement was approved by the council of the city of Shaker Heights and, by its terms, Metromedia was prohibited from accepting any political advertisements at any time for display in or upon the Shaker Heights Rapid Transit System.

The evidence adduced at the trial established that, in the period of over 25 years the Shaker Heights Rapid Transit System has been municipally owned and operated, it has been the consistent policy and practice of the municipality to deny use of rapid transit property for political or public-issue advertising.

Appellant, a candidate for the office of State Representative to the General Assembly for District 56 in the 1970 general election, was refused paid political advertising space on the rapid transit system by Metromedia upon the basis of the contract between the city and Metromedia.

Appellant's prayer for a temporary and permanent injunction, restraining defendants from refusing to accept his political advertising on the Shaker Heights Rapid Transit System, was denied by the Court of Common Pleas.

The Court of Appeals affirmed, and the cause is now before this court pursuant to the allowance of a motion to certify the record.

Mr. Harry J. Lehman, in propria persona, and *Mr. Leonard Schwartz.*

Mr. Walter C. Kelley, Jr., director of law, for appellee city of Shaker Heights.

Messrs. Baker, Hostetler & Patterson and *Mr. H. Stephen Madsen,* for appellee Metromedia, Inc.

CORRIGAN, J. We are confronted herein with important issues of constitutional dimension in which appellant urges that the Shaker Heights Rapid Transit System, owned and operated by the city of Shaker Heights, which accepts paid commercial advertising for display in its rapid transit vehicles, may not refuse to accept paid political advertising because such refusal is a violation of a citizen's rights of free speech and equal protection under the First and Fourteenth Amendments to the United States Constitution and Section 11 of Article I of the Ohio Constitution.

The "freedom of speech and press" issue raised by appellant may be succinctly stated: It is whether or not the acceptance of commercial advertisements and their display in publicly owned and operated rapid transit vehicles results in the creation of "forums," such as newspapers, magazines, radio and television, wherein free expression of ideas is constitutionally mandated.

We hold that it does not. As pointed out in the brief of appellee city of Shaker Heights: "A long line of decisions has established the rule that commercial messages do not come within the orbit of First Amendment protection." See

Freedom of Expression in a Commercial Context, 78 Harvard L. Rev. 1119.

In other words, the constitutionally protected right of free speech with respect to forums for oral speech, or the dissemination of literature on a city's streets, does not extend to commercial or political advertising on rapid transit vehicles. Although the city has elected to lease space on its rapid transit vehicles for commercial advertisements, it does not follow that the city must accept political advertisements.

There is an obvious and fundamental difference between transit vehicles and communications media such as newspapers, magazines, radio and television, the primary purpose of each of which is to serve as a forum for the exchange and interplay of ideas. The city has not opened up its transit vehicles to any exchange or presentation of ideas, political or otherwise. The sale of space for commercial advertising in or upon the rapid transit vehicles does not create such a forum, nor does it confer First Amendment rights.

The constitutional language is simple. The First Amendment to the United States Constitution provides:

"Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Section 11 of Article I of the Ohio Constitution reads:

"Every citizen may freely speak, write, and publish his sentiments on all subjects * * * and no law shall be passed to restrain or abridge the liberty of speech, or of the press. * * *"

The establishment of a commercial advertising program on these rapid transit vehicles was not intended to create

a free speech forum or a free press, and we will not torture these concepts to pressure such a commercial advertising plan into First Amendment ambits. The proponents are confusing free speech forums with the marketplace. Purveyors of goods and services saleable in commerce may purchase advertising space on an equal basis, whether they be house builders or butchers. They are coursing in the stream of commerce. But the Rapid Transit System has determined that political advertising is not acceptable as a matter of long-time policy because of the "chances for abuse, the possibility of discrimination or favoritism, and the risk of violating the passengers' rights." There is no distinction as to candidates. As a class, they are excluded from using the rapid transit vehicles for their political advertising.

It was pointed out by Justice Brandeis, in *Packer Corp. v. Utah* (1932), 285 U. S. 105, 110, that street car advertising is a special class of advertising. The Utah Supreme Court was quoted with approval in the opinion:

"'* * * Advertisements of this sort are constantly before the eyes of observers on the streets and in street cars to be seen without the exercise of choice or volition on their part. Other forms of advertising are ordinarily seen as a matter of choice on the part of the observer. The young people as well as the adults have the message of the billboard thrust upon them by all the arts and devices that skill can produce. In the case of newspapers and magazines, there must be some seeking by one who is to see and read the advertisement. The radio can be turned off, but not so the billboard or street car placard. These distinctions clearly place this kind of advertisement in a position so that regulations or prohibitions may be imposed upon all within the class. * * *'"

It is well stated in 16 American Jurisprudence 2d 905, Constitutional Law, Section 518, that:

"The general rule that legislation which affects alike all persons pursuing the same business under the same conditions is not such class legislation as is prohibited by constitutional provisions is subject to limitation to the extent that it does not permit discriminations by which persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. The power of the legislature to impose restrictions on a lawful calling must be exercised in conformity with the constitutional requirement that such restrictions must operate equally upon all persons pursuing the same business or profession under the same circumstances. * * *"

Particular individuals may not be selected from a class or locality and subjected to peculiar rules or have special obligations or burdens imposed upon them from which others in the same class or locality are exempt.

It is stated further in 16 American Jurisprudence 2d 906, Section 518:

"* * * The constitutional guaranty as to the equal protection of the laws * * * requires that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under similar circumstances, and that no greater burdens in engaging in a calling should be laid upon one than are laid upon others in the same calling and condition."

As a class, all candidates for political office are treated alike under the Shaker Heights Rapid Transit System's commercial advertising policy, and that is exactly the ex-

tent of their rights under the constitutions of Ohio and of the United States.

As indicated in *Valentine* v. *Chrestensen* (1942), 316 U. S. 52 (a case involving a commercial message on one side of a handbill and a political message on the other side), the control of *commercial* advertising is entirely within the scope of local government. It seems to follow logically that a local government may regulate the type of commercial advertising it accepts, and that it is within the authority of that local government to accept only commercial advertising, absent a specific holding to the contrary on this question by the Supreme Court of the United States.

Manifestly, there is no denial of equal protection of the laws, as claimed by plaintiff, because everybody in his class as a candidate for public office is treated identically, and his political advertising is not accepted because of policy. Shaker Heights sets plaintiff's class apart from house builders, butchers and other business entrepreneurs who regularly patronize the commercial advertising market and who are the commercial customers of the Shaker Heights Rapid Transit System advertising plan.

For the above reasons, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

HERBERT, CELEBREZZE and P. BROWN, JJ., concur.
O'NEILL, C. J., STERN and W. BROWN, JJ., dissent.

STERN, J., dissenting. This case of first impression in Ohio revolves on the issue of whether a municipality, an arm of state government, is constitutionally prohibited

from forbidding paid political[1] advertisements from appearing at any time in a place which that same arm of state government has deemed to be proper for the display of paid commercial advertisements. I feel that such conduct is constitutionally prohibited.

It should be noted that the issue herein is not whether a municipality must permit advertising of any nature on its rapid transit system. That issue is avoided since Shaker Heights has deemed it proper to encourage the display of paid commercial advertisements on its transit system.

Article 15[2] of the contract between Shaker Heights and Metromedia prohibits Metromedia from accepting political advertisements for display on Shaker's transit system. Such a contract, by an Ohio municipality, constitutes state action[3] subject to the prohibition of Section 11, Article I

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[1] Neither party has elucidated as to the meaning of the term "political" advertisement as used herein. I assume, therefore, that it is restricted to its usual meaning of expression of ideas "pertaining or relating to the policy or the administration of government, state or national." Black's Law Dictionary (4 Ed.). This, of course, would include promoting or urging the defeat of candidates for public office or of issues to be submitted to the electorate.

[2] "15. All advertising matter at any time inserted or placed by the contractor in or upon any of said cars shall be subject to approval by Shaker Heights and shall be of reputable character, and if any immoral, vulgar, disreputable or libelous advertisements are so placed or inserted at any time during the term of this agreement, the contractor will remove the same promptly upon request of Shaker Heights, and if the contractor shall fail to do so, the employees of Shaker Heights may forthwith remove the same. The contractor shall not place political advertising in or upon any of the said cars or in, upon or about any other additional and further space granted hereunder."

[3] I am not concerned herein with conduct by a private citizen or by a private organization. This contract is the direct result of action by a municipal corporation which has been established as an instrumentality of state government.

of the Ohio Constitution. *Peltz* v. *South Euclid* (1967), 11 Ohio St. 2d 128. Such state action also invokes the protection of the First and Fourteenth Amendments to the United States Constitution. *Peltz, supra; Gitlow* v. *New York* (1925), 268 U. S. 652.

Appellant argues that such state action denies him equal protection of the laws, and deprives him of freedom of speech and the press. Before discussing either, I wish to examine the nature of the denial imposed upon appellant.

The use of posters and signs as a method of disseminating information has gained widespread usage throughout this country and this method is widely used for political, commercial, charitable and civic purposes. When accomplished for purely commercial reasons, such method of expression does not constitute speech within the protection of the First Amendment. *Valentine* v. *Chrestensen* (1942), 316 U. S. 52; *Breard* v. *Alexandria* (1951), 341 U. S. 622; *Peltz, supra.*

However, where such method of expression is used for political purposes, it constitutes a vehicle for communication of information and opinion which is not only concurrent with the historic connotation of First Amendment rights, as defined in *Lovell* v. *Griffin* (1938), 303 U. S. 444, but is also concurrent with the concept of assurance of freedom upon which our form of government rests, and the First Amendment protection is neither lessened by the fact that the political message is proposed as a paid advertisement (*New York Times Co.* v. *Sullivan* [1964], 376 U. S. 254, 266), nor that alternative methods of dissemination exist. (*Schneider* v. *State* [1939], 308 U. S. 147, 163.) Accordingly, it is not only in the best interest of government that these methods of communication be encouraged, but it is mandated by our Constitution.

This is not to say that a municipality may not absolutely prohibit the display of advertisements on its rapid transit system or other property under the control of the city. Notwithstanding the free-speech forum which historically exists on public sidewalks and parks, rapid transit systems do not inherently constitute such a forum. Further, the mere creation of a display arena for paid advertisements does not imply that the municipality has waived its right to appropriately regulate advertisements as to time, place, and manner of dissemination. However, such regulations must be in support of an appropriate governmental interest.

There exists, then, a situation in which a municipality has decided to permit paid *commercial* advertisements in a locale in which it entirely prohibits the display of paid *political* advertisements. For that reason, I choose to analyze this case in terms of the equal protection clause of the Fourteenth Amendment.

Although I do not feel compelled to resolve the First Amendment issue, I do feel that that issue cannot be resolved without considering the effect that the allowance of the display of public service advertisements would have on the question of whether a free-speech forum has been created. Such advertisements do not constitute pure commercial communication, and therefore merit consideration on the issue of creation of a free-speech forum.

A fundamental element of the equal protection argument is a determination of whether there is an appropriate governmental interest suitably furthered by the differential treatment afforded these two classes of paid advertisements. See *Chicago* v. *Mosley* (1972), 408 U. S. 92; *Reed* v. *Reed* (1971), 404 U. S. 71; *Dunn* v. *Blumstein* (1972), 405 U. S. 330.

Public facilities have a primary public function or purpose to serve, and the assurance by the municipality of the accomplishment of this function or purpose is properly left to the discretion of that body. Public schools constitute such a facility, having as a primary purpose the education of our children, and while it may not be mandatory that a school auditorium be made available as a forum for the expression of First Amendment ideas, it is certain that it cannot arbitrarily be made available as a forum for the expression of some of these ideas to the exclusion of others.

School auditoriums, however, are seldom used as an arena solely for the dissemination of purely commercial expressions. Consequently, cases involving school auditoriums, public parks, etc., generally involve questions of freedom of speech, necessitating the application of the "clear and present danger" test. See *Terminiello* v. *Chicago* (1949), 337 U. S. 1; *Thomas* v. *Collins* (1945), 323 U. S. 516. Free-speech forums can also be created in regard to other public facilities, including rapid transit systems, for in *Wirta* v. *Alameda-Contra Costa Transit Dist.* (1967), 64 Cal. Rep. 430, 434 P. 2d 982, in addition to allowing paid commercial advertisements to be displayed on the transit system, paid political advertisements were authorized at prescribed times. Thus, a forum for the expression of First Amendment views had been created, and, as that court held, other advertisements expressing opinions and beliefs within the ambit of First Amendment protection could not then be prohibited for reasons of administrative convenience. See, also, *Kissinger* v. *New York City Transit Authority* (S. D. N. Y. 1967), 274 F. Supp. 438.

For additional cases on this and related issues, see *Business Executives' Move For Vietnam Peace* v. *Federal*

Communications Comm. (C. A. D. C. 1971), 450 F. 2d 642; *Danskin* v. *San Diego Unified School Dist.* (1946), 28 Cal. 2d 536, 171 P. 2d 885; *Hillside Community Church* v. *Tacoma* (Wash. 1969), 455 P. 2d 350; *Lee* v. *Bd. of Regents of State Colleges* (W. D. Wis. 1969), 306 F. Supp. 1097; *Zucker* v. *Panitz* (S. D. N. Y. 1969), 299 F. Supp. 102; *Radical Lawyers Caucus* v. *Pool* (W. D. Tex. 1970), 324 F. Supp. 268; *Ross* v. *Goshi* (D. C. Hawaii 1972), No. 72-3610, decided December 8, 1972.

In any event, it is beyond dispute that appellees have created an arena for the display of paid advertising. (*Wirta, supra.*) In deciding to create such an arena, the city examined the detrimental effects which such displays might have on the primary purpose of transporting people, apparently finding that the primary function could be accomplished while gaining the pecuniary advantage of providing space for the display of paid *commercial* advertisements.

I do not discount the possibility that under some circumstances the differing nature of political and commercial advertising might justify permitting one to the exclusion of the other. However, I find no such circumstances herein.

This method of disseminating beliefs and opinions is not dependent upon the *nature* of the subject matter being dispersed, and any legitimate objections which a municipality might have toward the time, place, and manner of dissemination would be the same, whether the nature of the advertisement be commercial, political, or public service. Each advertisement could reasonably be regulated as to such things as size, obtrusiveness, and the time period over which each advertisement may be displayed. Indeed, the

policy followed by Metromedia in regard to other transit systems[4] provides such control now.

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[4] I note, for reference purposes only, appellee Shaker Heights' exhibit A, which sets forth the Metro Transit Advertising Copy Policy as follows:

"(1) Metro Transit Advertising will not display advertising copy that is false, misleading, deceptive and/or offensive to the moral standards of the community, or contrary to good taste. Copy which might be contraryy to the best interests of the transit systems, or which might result in public criticism of the advertising industry and/or transit advertising will not be acceptable.

"(2) Metro Transit Advertising will not accept any political copy that pictorially, graphically or otherwise states or suggests that proponents or opponents of the persons or measures advertised are vulgar, greedy, immoral, monopolistic, illegal or unfair.

"(3) All copy subject to approval. Rough sketches with proposed copy required on all political advertising.

"(4) Metro Transit Advertising reserves the right at all times to decline both sides of any proposition and/or opposing candidates.

"(5) Political advertising must carry, visible within the advertising area of the poster, the tag-line:

" 'Paid Political Advertising Sponsored by . . . ' in letters sized as follows:

"Exterior: 30″ x 144″ King size posters—1″
21″ x 44″ Traveling displays—½″
21″ x 72″ Taillight spectacular—1″
"Interior: 11″ x 28″—¼″ 11″ x 56″—¼″

"(6) Contracts for political advertising space must be accompanied by check for entire amount of contract.

"(7) Posters and/or cards must be delivered, prepaid, 10 days prior to posting date.

"(8) Equal opportunity to purchase space will be offered and allotted for each opposing candidate, bond issue or referendum. If necessary, contracts for political advertising will be held until 30 days prior to the contract posting date, at which time Metro Transit Advertising will allocate the advertising space to each candidate, issue or referendum.

"(9) Minimum order acceptable for either cards or posters is at the one-[month rate].

"(10) Political advertising will not be accepted on following systems: Shaker Rapid—Maple Heights—North Olmsted—Euclid, Ohio."

It follows that, to the extent the city has allowed those disadvantages of commercial advertisng which are identical to disadvantages of political advertising, it is estopped from voicing such disadvantages in support of its absolute prohibition of political advertising.

However, appellees contend that the display of paid political advertisements on the city's transit system presents additional unique disadvantages, such as: (1) They might be interpreted as an endorsement by the city of a particular person or idea; (2) there exists a reasonable chance for abuse, the possibility of discrimination or favoritism; (3) the risk of violating the passengers' rights; and (4) the controversial nature of political advertisements.

That the first of these evils can be negated by requiring a statement of nonendorsement on the face of the advertisement is beyond question. Even in the absence of such a disclaimer, it is doubtful that a political advertisement, as is here contemplated, would be interpreted as an endorsement by the city of a particular candidate or of one side of a particular issue any more than the display of a particular commercial advertisement would be thought of as an endorsement by the city of a particular commercial product.

The conjectured possibility that favoritism might be shown to one party over the other is likewise no justification for this absolute discrimination against paid political advertisements. There being no evidence in the record supporting this contention, I feel that the presumption must be made that those responsible would fulfill their duties in a fair manner. Further, so long as the potential space is made equally available to all who seek it (whether taken advantage of or not, see *Wirta, supra*), there is little chance that only one of the parties would be permitted to

utilize the space. This further negates the possible presumption of endorsement, since all sides of an issue could be advertised.

As to the risk of violating passengers' rights, I acknowledge that to some extent rapid transit passengers constitute a captive audience. As indicated in the majority opinion, magazines and newspapers must be sought out by a reader and radios can be turned off, while advertisements of the sort involved herein "• • • are constantly before the eyes of observers • • •." *Packer Corp.* v. *Utah* (1932), 285 U. S. 105, 110. However, this does not mean that the right of a passenger on a transit system to privacy is not subject to reasonable limitations in relation to the rights of others, for, as stated in *Public Utilities Comm. of D. C.* v. *Pollak* (1952), 343 U. S. 451, 464, "• • • however complete his [a passenger's] right of privacy may be at home, it is substantially limited by the rights of others when its possessor travels on a public thoroughfare or rides in a public conveyance." That case held that a transit system could broadcast a radio program within its vehicles, despite the fact that individual passengers could not shut the broadcast off.

The lack of choice of the passengers involved in *Pollak, supra,* is far greater than that involved herein, for these passengers are not compelled to read or even to look at the advertisements. Further, it could not be any less violative of a passenger's rights to "confront" him with commercial advertisements than to "confront" him with political ones.

Finally, I find no evidence to support appellees' contention that either the political advertisement submitted by appellant, or paid political advertisements in general, are of such a controversial nature as to create a potential danger to passengers. Indeed, it is in the interest of better

government that some controversy over political issues be created.

It is my conclusion that where a municipality has created an arena for the display of paid advertisements by providing facilities for such paid advertisements on its rapid transit system, it cannot, in the absence of an appropriate governmental interest, discriminate against paid political advertisements in favor of paid commercial advertisements.

Having determined that the refusal to accept appellant's political advertisement for display constitutes a denial of equal protection contrary to the Fourteenth Amendment, I see no need to further examine the issue of whether a First Amendment forum is created when, by state action, an area of public property is made available for the expression of ideas and beliefs, most of which are not protected by the First Amendment.

I would reverse the judgment of the Court of Appeals.

O'NEILL, C. J., and W. BROWN, J., concur in the foregoing dissenting opinion.

Judgment of the Supreme Court of Ohio

THE SUPREME COURT
OF THE STATE OF OHIO

1973 TERM

No. 72-389

To wit: May 23, 1973

THE STATE OF OHIO,
CITY OF COLUMBUS.

HARRY J. LEHMAN,

Appellant,

—VS.—

CITY OF SHAKER HEIGHTS *et al.*,

Appellees.

APPEAL FROM THE COURT OF APPEALS FOR CUYAHOGA COUNTY

This cause, here on appeal from the Court of Appeals for Cuyahoga County, was heard in the manner prescribed by law. On consideration thereof, the judgment of the Court of Appeals is affirmed; for the reasons set forth in the opinion rendered herein,

and it appearing that there were reasonable grounds for this appeal, it is ordered that no penalty be assessed herein.

It is further ordered that the ..... appellee.... recover from the ..... appellant.... its costs

herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Cuyahoga County for entry.

I, Thomas L. Startzman, Clerk of the Supreme Court of Ohio, certify that the foregoing entry was correctly copied from the Journal of this Court.

Witness my hand and seal of the Court

this ..... day of ..... 19....

..... *Clerk*

..... *Deputy*

Journal Entry of the Court of Appeals for Cuyahoga County, Ohio

COURT OF APPEALS
OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

No. 30825

HARRY J. LEHMAN,

Appellant,

—VS.—

CITY OF SHAKER HEIGHTS, *et al.*,

Appellee.

Date November 11, 1971

APPEAL FROM COMMON PLEAS COURT

No. 885,898

JOURNAL ENTRY

This cause came on to be heard upon the pleadings and the transcript of the evidence and the record in the Common Pleas Court, and was argued by counsel for the parties; and upon consideration, the court finds no error prejudicial to the appellant and therefore the judgment of the Common Pleas Court is affirmed. Each assignment of error was reviewed and upon review the following disposition made:

The first assignment of error is that the refusal of the City of Shaker Heights to accept paid political advertisements on the cars of its Shaker Heights Rapid Transit from the appellant constituted a denial of its freedom of speech and equal protection of the laws under the United States and Ohio Constitutions.

> "A municipality is not powerless to enact and enforce reasonable regulations . . . . It may enact ordinances prohibiting the attachment of political posters to public property and permitting recovery of the cost of removal of such posters." (*Peltz* v. *City of South Euclid,* 11 Ohio St. 2d 128)

Thus it is clear that the right to post political signs, particularly on public property, is not absolute, but rather is subject to reasonable regulation by the municipality.

In this case, the City of Shaker Heights has prohibited all political advertisements on the cars of its Shaker Rapid Transit Company. Such a prohibition as to public property is not a denial of the appellant's freedom of speech and, since it applies to all political advertisers, it is not a denial of equal protection of the laws.

The second assignment of error is without merit because this court is of the opinion that the judgment of the trial court in this case was correct, regardless of his reasoning, and affirms that judgment for the reasons stated in our conclusions as to assignment of error No. 1.

It is ordered that appellee recover of appellant its costs herein taxed.

The Court finds there was reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. Exceptions.

COOK, *P.J.*, JONES, *J.* and HOFSTETTER, *J.*, concur.

ROBERT E. COOK
Presiding Judge

ROBERT E. COOK
(Cook, P. J., Jones, J. and Hofstetter, J. of the 11th Appellate District sitting by appointment in the 8th Appellate District)

N.B. This entry is made pursuant to the third sentence of Rule 22D, Ohio Rules of Appellate Procedure. This is an announcement of decision, (see Rule 26). Ten (10) days from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

Journal Entry of the Trial Court

IN THE

COURT OF COMMON PLEAS

Case No. 885898

HARRY J. LEHMAN,

Plaintiff,

vs.

CITY OF SHAKER HEIGHTS, *et al.*,

Defendants.

STATE OF OHIO,
COUNTY OF CUYAHOGA, *ss.*:

This matter came on to be heard upon the complaint of plaintiff praying for a declaratory judgment and for an injunction, answers of the defendants, evidence presented to the court, and briefs of counsel.

This court, being duly advised in the premises, having considered the evidence and the law applicable thereto and on the authority of judgment of this court in Cuyahoga County Common Pleas Case No. 701922, affirmed by the Cuyahoga County Court of Appeals Case No. 24381, hereby declares that the constitutional rights of the plaintiff under the Constitutions of the State of Ohio and the United States have not been violated or infringed upon by the refusal of defendants to accept the political advertising of plaintiff on the Shaker Heights Rapid Transit.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED that plaintiff's request for a temporary and permanent injunction against defendants is denied, plaintiff's petition is dismissed, and plaintiff is charged with the costs incurred herein.

PERCY J. JACKSON
Judge

Portion of the Contract Between the City of Shaker Heights and Metromedia, Inc.

THIS AGREEMENT, made and entered into as of the 1st day of August, 1970, by and between the City of Shaker Heights, a municipal corporation of the State of Ohio, party of the first part, hereinafter sometimes referred to as "SHAKER HEIGHTS," and Metromedia, Inc., (on behalf of its division, Metro Transit Advertising), doing business at Cleveland, Ohio, party of the second part, hereinafter sometimes referred to as the "CONTRACTOR,"

WITNESSETH, THAT:

WHEREAS, SHAKER HEIGHTS owns and is engaged in the operation of interurban electric railroad lines for transportation of passengers, hereinafter sometimes called the "TRANSIT LINES," in the Cities of Cleveland and Shaker Heights, Ohio, and the suburban area adjacent to Shaker Heights.

WHEREAS, the CONTRACTOR is engaged in the advertising business and principally in the placing of cards, signs, hangers and other forms of advertising for clients in or upon street cars and buses and other vehicles used in transportation of passengers, and in connection therewith, enters into contracts with its clients for the rendition of such advertising service and is in a position to render expert service to SHAKER HEIGHTS by creating revenue for it from advertising in its rail cars, buses and any other vehicles hereinafter called "CARS," used in its TRANSIT LINES.

NOW, THEREFORE, SHAKER HEIGHTS, in its capacity as owner and operator of said TRANSIT LINES, and the CONTRACTOR, each in consideration of the premises and the promises and agreements of the other herein set forth, have agreed and do hereby agree as follows:

* * * * *

15. * * * The CONTRACTOR shall not place political advertising in or upon any of the said CARS or in, upon or about any other additional and further space granted hereunder.